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No. 01-1150

In the Supreme Court of the United States

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: April 3, 2002

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Petitioners, Leon C. Baker P.C. ("P.C.") and Leon C. Baker ("Baker"), individually, submit this Supplemental Brief pursuant to United States Supreme Court Rule 15, paragraph 8.

I

On February 25, 2002 this Court granted certiorari in *Howsam v. Dean Witter*, case No. 01-800. The issue in

that case is substantially identical to the issue in this case. In both cases the basic question is this: When the parties to a contract agree that *all* their disputes shall be submitted to arbitration, are affirmative defenses, nevertheless, to be ruled on by courts rather than by the arbitrator? In this case the alleged affirmative defense is res judicata. In *Howsam*, it is statute of limitations.

When a petition for certiorari presents an issue that is similar to an issue already pending before this Court in another case in which certiorari has been granted, the issue is obviously an important one worthy of this Court's consideration. The grant of certiorari in *Howsam* is an additional reason to grant certiorari in this case.

Moreover, this case raises the issue considerably more clearly than *Howsam*. In tha case, Dean Witter contends that a six year limitation in the rules of the National Association of Securities Dealers (NASD) on the time for filing an arbitration claim is not analogous to a statute of limitations. Rather, Dean Witter argues, the time limitation is a condition of the arbitration agreement itself. Dean Witter contends (1) that it agreed to arbitrate only claims which were less than six years old, and (2) that questions as to whether the parties agreed to arbitrate a particular dispute are to be determined by courts not the prospective arbitrators.

Dean Witter's argument in *Howsam* invokes the difference between (i) a case in which there is a dispute as to whether the parties entered into any arbitration agreement at all and (ii) one in which the parties agree they entered into an arbitration agreement but disagree as to

whether their current dispute is covered by their arbitration agreement.

The first category, whether there was any arbitration agreement at all, is indisputably an issue for courts to decide. But if the parties indisputably entered into an arbitration agreement, then an issue as to the scope of the arbitration agreement might well be for the arbitrator, especially if the parties did agree, as they did in this case, to submit *all* their disputes to arbitration.

The ruling of the Alabama courts is unabashedly that the agreement is irrelevant (and, therefore, so is the Federal Arbitration Act). They insist that courts, not arbitrators, must rule on preclusion defenses, regardless of what the parties may have agreed. There is no ambiguity as to the issue presented by this case, and this is an even clearer case than *Howsam* for granting a petition for certiorari.

A grant of certiorari in this case would, therefore, bring the issue to this Court even more clearly than does the *Howsam* case as to what disputes the the parties had agreed to arbitrate.

II

A case note, Arbitration–Standard of Review, 115 Harvard Law Review 1267 (February 2002), discusses a decision of the Tenth Circuit Court of Appeals, *Bowen v. Amoco Pipeline Company*, 254 F.3d 925 (10th Cir. 2001),

which raises an issue as to the roles of courts and arbitrators similar to that in the present case and *Howsam*, but from a different perspective. [1]

In all three cases the issue is: May courts disregard an agreement of the parties as to which of their disputes should be arbitrated? In the present case the Alabama courts took it upon themselves to rule on a preclusion defense even though the parties had agreed to arbitrate *all* their disputes. In *Bowen*, by contrast, the district court and the Tenth Circuit Court of Appeals disregarded the agreement of the parties that the award of the arbitrators *should* be subject to judicial review if the losing party contended that the award was not supported by the evidence. Both courts, despite this agreement, declined to review whether the award was supported by evidence.

The Tenth Circuit recognized that the Ninth and Fifth Circuits had reached conclusions contrary to its own. This conflict among those Courts of Appeals is analogous to the conflicts among the Courts of Appeals and the state courts set forth in the Petition for Certiorari. Counsel for Amoco Pipeline Company have informed us, however, that their client decided not to seek certiorari in that case.

1.With the Permission of the Editors of the Harvard Law Review, a copy of the Note is attached to this Supplemental Memorandum.

CONCLUSION

The additional authorities cited above support the application for a Writ of Certiorari.

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ARBITRATION — STANDARD OF REVIEW — TENTH CIRCUIT REJECTS CONTRACTUAL EXPANSION OF JUDICIAL REVIEW OF ARBITRATION AWARDS. — *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

In enforcing arbitration agreements under the Federal Arbitration Act (FAA),[1] the Supreme Court has held that federal policy does not require that arbitration follow any particular set of procedural rules.[2] Federal policy instead supports arbitration under the variety of procedural rules defined by private agreements.[3] This characterization of federal policy has led two U.S. courts of appeals to conclude that private parties may contract around the procedural provisions of the FAA that limit judicial review of arbitration awards.[4] Recently, in *Bowen v. Amoco Pipeline Co.*,[5] the Tenth Circuit explicitly rejected this conclusion.[6] The court reasoned that enforcement of contractual provisions providing for expanded judicial review would undermine federal policies and interfere with the judicial process.[7] This reasoning, however, rests on a construction of the FAA that undermines the federal policy supporting enforcement of voluntary arbitration agreements and threatens the viability of arbitration as an alternative to litigation.

In 1993, Ernest Bowen noticed oily contamination in a creek located on his property.[8] He filed a complaint with the Oklahoma Corporate Commission (OCC), which traced the pollution to oil that had escaped from one of the pipelines beneath the creek.[9] The OCC recommended that the pipelines' owners uncover their lines to expose past or present leaks.[10] One owner, Amoco Pipeline Company, refused to comply with this recommendation.[11]

Frustrated by Amoco's refusals, Bowen and his wife filed suit in the U.S. District Court for the Eastern District of Oklahoma.[12] In response, Amoco moved to stay the proceedings pursuant to a mandatory arbitration provision contained in the document governing the

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1 Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15 (2000)).

2 *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989).

3 *Id.* ("Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." (internal citation omitted)).

4 *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995).

5 254 F.3d 925 (10th Cir. 2001).

6 *Id.* at 933.

7 *Id.* at 933–37.

8 *Id.* at 927.

9 *Id.*

10 *Id.* at 928.

11 *Id.*

12 *Id.*

pipeline easement.[13] The district court granted the motion and ordered resolution of the dispute by arbitration.[14]

In 1999, the parties submitted their case to a panel of three arbitrators.[15] The parties agreed that the panel would apply the Rules for Non-Administered Arbitration of Business Disputes with one significant modification: each party would have the right to appeal the panel's decision to the district court "on the grounds that the award [was] not supported by the evidence."[16] Following arbitration proceedings, the panel awarded the Bowens $5,373,000 in compensatory and punitive damages.[17]

Pursuant to section 9 of the FAA, the Bowens filed a motion in district court to confirm the award.[18] Amoco, in turn, filed a notice of appeal under the modified rules of the arbitration agreement.[19] The district court declined to apply the parties' contractually expanded standard of review to the award.[20] The court instead applied the FAA's narrower standard,[21] under which it granted the Bowens' motion for confirmation and rejected Amoco's notice of appeal.[22]

The Tenth Circuit affirmed. Writing for the panel, Chief Judge Tacha[23] considered the "difficult question" posed by the competing standards of review specified by the parties' agreement and by the FAA.[24] The court acknowledged the FAA's policy of "ensur[ing] judicial enforcement of private arbitration agreements," but argued that the Fifth and Ninth Circuits had erred in concluding that this policy sanctioned parties' "interfere[nce] with the judicial process."[25] In addi-

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13 *Id.* at 929 & n.1.

14 *Id.* at 928.

15 *Id.* at 930.

16 *Id.* (quoting the parties' agreement) (internal quotation marks omitted).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 930, 933.

21 Section 10(a) of the FAA provides that district courts may vacate arbitration awards under the following circumstances:

> (1) Where the award was procured by corruption, fraud, or undue means.
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000).

22 *Bowen*, 254 F.3d at 930.

23 Senior Circuit Judge Gibson (sitting by designation) and Judge Lucero joined Chief Judge Tacha's opinion.

24 *Bowen*, 254 F.3d at 933.

25 *Id.* at 933–34.

tion, the contractual provision threatened to frustrate other federal policies furthered by the FAA, including those favoring arbitral finality and independence.[26] Whether the provision did in fact frustrate these policies, the court argued, was the "key question,"[27] because the policies served by the FAA circumscribe the range of alternative procedural rules that parties may adopt.[28]

Finding that these policies would be poorly served by enforcing the parties' provision for expanded judicial review, the court reviewed the award in accordance with the narrower standards defined by the FAA and by judicial interpretations of the Act.[29] Under these standards,[30] Chief Judge Tacha argued, the arbitration panel had not exceeded its authority in ordering the cleanup of the Bowens' property, providing an escrow account for that purpose, or awarding punitive damages.[31]

In answering the "difficult question" posed by *Bowen*, the Tenth Circuit expressed legitimate concerns[32] regarding parties' ability to modify the public process of judicial review through private agreement. The court's characterization of this ability as fundamentally inconsistent with the policies of the FAA, however, is less tenable. In justifying its characterization, the court relied on questionable constructions of the Act's statutory language and legislative history, and on a flawed understanding of its underlying policies. These unstable foundations led the court to deny the disputing parties the full benefit

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26 *Id.* at 935.

27 *Id.*

28 *Id.* The court found that — unlike other rules clearly modifiable by contract — the procedural rule in question "threaten[ed] to undermine the policies behind the FAA." *Id.* The court considered it "illogical" to hold that "the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated." *Id.*

29 *Id.* at 937.

30 The court described the standard of review provided for by the FAA as "strictly limited," a "highly deferential standard [that] has been described as 'among the narrowest known to the law.'" *Id.* at 932 (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995) (quoting *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989)) (internal quotation marks omitted)) (internal quotation marks omitted).

31 *Id.* at 938–40.

32 As Judge Kozinski noted in his concurring opinion in *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), enforcement of contractually modified standards of review, unless appropriately limited, has the potential to force reviewing courts to engage in work different from that which they routinely perform. *See id.* at 891 (Kozinski, J., concurring) (considering the possibility that contractual provisions may require reviewing courts to decide matters by flipping a coin). Like the provisions in dispute in *LaPine*, however, the provision in dispute in *Bowen* required application of a standard presumably familiar to reviewing courts. *Compare LaPine*, 130 F.3d at 887 (reporting that the arbitration agreement at issue called for application of "not supported by substantial evidence" and "conclusions of law are erroneous" standards), *with Bowen*, 254 F.3d at 930 (noting specification of "not supported by the evidence" standard). Thus, although legitimate in extreme cases, the Tenth Circuit's concerns appear only tangentially implicated by the particular provision on which the parties had agreed.

of their bargain, undermining the very objectives the court sought to further.

The Tenth Circuit began its analysis by examining section 10 of the FAA, ultimately concluding that the section provides "explicit guidance"[33] supporting narrowly limited review to "ensure[] judicial respect for the arbitration process" and to "preserv[e] [its] independence."[34] Neither the statutory text nor its authoritative interpretations, however, appear to warrant this narrow understanding of parties' freedom to shape the scope of judicial review. Although section 10 enumerates exceptions to the general rule of enforceability for arbitration awards, it does not indicate that these exceptions were intended to form a comprehensive list.[35] Courts have accordingly supplemented the section with judicially crafted exceptions. The most notable is the exception discussed in *Bowen* for arbitration awards that demonstrate "manifest disregard of the law."[36] The panel's application of this exception — one not expressly provided for by section 10 — undermines its assertion that the statute provides explicit and unalterable guidance limiting judicial review of arbitration awards.

The congressional debate that preceded enactment of the FAA, moreover, reflects almost exclusive concern with remedying judicial reluctance to enforce private arbitration agreements.[37] As the Tenth Circuit noted, the Supreme Court has interpreted this history as reflecting a clear purpose to "place an arbitration agreement upon the same footing as other contracts."[38] Thus, there is little support in the legislative history for the proposition that the Act's judicial review provisions may not be contractually modified because doing so would frustrate independent congressional objectives. Instead, the record suggests that the Act's judicial review provisions are subordinate to

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33 *Bowen*, 254 F.3d at 934.

34 *Id.* at 935.

35 Indeed, the section provides that district courts "*may*" vacate arbitration awards in "*any*" of the described cases, 9 U.S.C. § 10 (2000) (emphasis added), phrasing that is less restrictive than language providing that district courts *must* vacate awards in *only* the described circumstances.

36 This exception derives from Supreme Court dictum in *Wilko v. Swan*, 346 U.S. 427 (1953), in which the Court suggested that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436–37; *see* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1257 (2000).

37 The House report that accompanied the FAA stated that "[t]he need for the law arises from an anachronism of our American law" that had caused American courts to "refuse[] to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. REP. NO. 68-96, at 1–2 (1924); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 33 (1992) (noting reformers' frustration with the unenforceability of arbitration agreements).

38 *Bowen*, 254 F.3d at 933 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985) (quoting H.R. REP. NO. 96, at 1 (1924)) (citation and internal quotation marks omitted)) (internal quotation marks omitted).

the statute's overall aim of ensuring that arbitration agreements are enforced just as all other private agreements are — according to their terms.

In light of the inconclusive guidance provided by the FAA's language and legislative history, the Tenth Circuit placed considerable emphasis on the policies underpinning the Act. The court argued that the Supreme Court's analyses of these policies demonstrate that the FAA "is more than a collection of default rules, which parties may alter with complete discretion."[39] In addition to the FAA's "primary policy ensuring judicial enforcement of private agreements to arbitrate,"[40] the Tenth Circuit claimed, the Act furthers secondary federal policies — including arbitral independence and creativity — that limit private parties' abilities to define the terms of arbitration agreements.[41]

The Tenth Circuit cited the Supreme Court's opinion in *Volt Information Sciences, Inc. v. Board of Trustees*[42] as support for the assertion that FAA policies may preclude the enforcement of privately modified arbitration rules. The panel emphasized that although the *Volt* Court upheld the enforceability of an agreement that modified federal arbitration rules by incorporating state procedures, it did so because the agreement could be enforced "*without doing violence to the policies* behind . . . the FAA."[43] From this phrase, the Tenth Circuit inferred the existence of independent federal policies limiting the enforceability of privately modified arbitration rules. This reading, however, neglects the Supreme Court's subsequent elaboration that "applying the state rule would not 'undermine the goals and policies of the FAA' because the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'"[44] *Volt*, then, suggests that the Tenth Circuit's emphasis on policies favoring the independence and finality of arbitration is misplaced. Federal policy instead appears firmly to favor the faithful enforcement of arbitration agreements according to their terms.

The Tenth Circuit found additional support for its interpretation of the FAA in the Supreme Court's earlier decision in *Southland Corp. v. Keating*.[45] The panel pointed to *Southland*'s holding that federal arbitration law preempts state procedural rules that "require a judicial forum for the resolution of claims which the contracting parties agreed

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[39] *Id.* at 935.

[40] *Id.* at 934.

[41] *See id.* at 935.

[42] 489 U.S. 468 (1989).

[43] *Bowen*, 254 F.3d at 934 (quoting *Volt*, 489 U.S. at 479 (emphasis added)) (internal quotation marks omitted).

[44] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (citation omitted) (quoting *Volt*, 489 U.S. at 478).

[45] 465 U.S. 1 (1984).

to resolve by arbitration."[46] From this statement, the court concluded that federal arbitration policies take precedence over state law and, a fortiori, over private agreements as well. But the federal arbitration policy with which the *Southland* Court appears most concerned is the policy supporting the enforcement of parties' agreements. Indeed, the Court identified the FAA's primary purpose as remedying "the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."[47] Here again, the Tenth Circuit provided an incomplete description of Supreme Court precedent that, rather than limiting, appears to maintain the FAA's "broad principle of enforceability."[48]

Ultimately, then, the Tenth Circuit's concerns over permitting private parties to expand judicial review of arbitration awards find little support in the language, legislative history, or underlying policies of the FAA. To the extent that it attempts to preclude such expansion, *Bowen* mischaracterized the FAA and its primary objective. Further, by limiting parties' abilities to shape arbitral procedures, the Tenth Circuit diminished the likelihood that parties will view arbitration as a fair,[49] voluntary,[50] and prudent[51] alternative to litigation. Arbitration, as the Tenth Circuit noted, presents a valuable means of "avoid[ing] the expense and delay of court proceedings."[52] Yet arbitration will secure these savings only if private parties elect to adopt it. Many parties, as evidenced by *Bowen* and cases arising in similar contexts,[53] appear to tie their commitments to arbitration to the availability of contractually modified standards of judicial review.

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46 *Bowen*, 254 F.3d at 935 (quoting *Southland*, 465 U.S. at 10) (internal quotation marks omitted).

47 *Southland*, 465 U.S. at 14.

48 *Id.* at 11.

49 *See* Cole, *supra* note 36, at 1201 & n.8 (citing social psychological research demonstrating that parties view dispute resolution as more fair when they are vested with procedural control).

50 Because "[lawyers drafting commercial agreements are usually unwilling to spend the time to negotiate . . . provisions for judicial review because they often consider the possibility of future litigation too remote," Stephen A. Hochman, *Judicial Review To Correct Arbitral Error — An Option To Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 120 (1997), those who do negotiate such provisions likely do so on behalf of parties that view the provision as a significant aspect of their agreement. Invalidating a modified judicial review provision while enforcing the remainder of the agreement may thus bind parties in a manner to which they never would have agreed.

51 *See* Stephen P. Younger, *Agreements To Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (referring to "growing concern" over the lack of appellate recourse left to parties "afflicted by maverick arbitration awards" that sometimes "fall[] well outside the reasonable expectations of the parties").

52 *Bowen*, 254 F.3d at 932 (quoting *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) (internal quotation marks omitted)) (internal quotation marks omitted).

53 *See, e.g.*, UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992 (8th Cir. 1998); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); Chi. Typographical Union v. Chi. Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991).